OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

August 2, 2001

Ms. Kimberley Mickelson
Olson & Olson
Three Allen Center, Suite 3485
333 Clay Street
Houston, Texas 77002

OR2001-3366

Dear Ms. Mickelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150253.

The City of Seabrook (the "city"), which you represent, received a request for thirteen categories of information, including information regarding: the Economic Development Corporation, the Houston-Galveston Area Council, recreational and outdoor grants, the area west of Highway 146 and north of Repsdorph, the through streets in the City of El Lago, and a right-of-way purchased from the Catholic Diocese of Galveston-Houston. You indicate that you have released some of the requested information to the requestor. You further indicate that you have previously released some of the requested information to the public. We therefore assume that you have also made this information available to the requestor. *See* Gov't Code § 552.007. However, you claim that some of the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[1]

We begin by addressing your argument that the city is not required to examine its computer hard drives to ensure that all responsive e-mails have been retrieved. We note that the Act applies only to "public information" in existence at the time of the request for information. *See* Gov't Code § 552.021; *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). "Public information" is defined under section 552.002 of the Act as:

[1]You indicate that a portion of the submitted information consists of a representative sample. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

> information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
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> (1) by a governmental body; or
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> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Public information may be recorded on various media, including "a magnetic, optical, or solid state device that can store an electronic signal." *Id.* § 552.002(b). Furthermore, "[t]he general forms in which media containing public information exist include ... a voice, data, or video representation held in computer memory." *Id.* § 552.002(c).

Computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed. To the extent an e-mail responsive to the instant request has only been placed in the "trash bin" or "recycle bin" of a program, the e-mail is still being "maintained" by the city for purposes of the Act and is still considered "public information." However, to the extent an e-mail responsive to the instant request has been deleted from the trash bin, and thus the location of the file on the hard drive has been deleted from the FAT, we believe the e-mail is no longer being "maintained" by the city and therefore the e-mail is no longer public information. *Id.* § 552.002(a).

The city's officer for public information carries the duty of promptly producing such public information when it is requested, unless the city wishes to withhold the information. *Id.* §§ 552.203, .221. If the city wishes to withhold the information, it must request a decision from the attorney general and submit to the attorney general, among other things, a copy or representative sample of the public information being requested. *Id.* § 552.301. Therefore, to the extent e-mails responsive to the instant request were still contained in a trash bin of a city computer program at the time of the request, the city was obliged to retrieve those e-mails and promptly make them available to the requestor or submit them to the Attorney General for a decision within fifteen business days of receiving the request. To the extent the city did not submit a representative sample of such e-mails for our review, we presume the city has made the e-mails available to the requestor. *See* Gov't Code § 552.021, .301, .302.

With respect to the information you submitted, we note that several documents are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;
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> . . .
>
> (5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate . . . .

Gov't Code § 552.022(a)(3), (5). Portions of Exhibits 3, 9, 12, and 13 are subject to section 552.022(a)(3) and (5) of the Government Code and thus must be released unless they are expressly made confidential under "other law." You argue that this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. Section 552.103 of the Government Code, the litigation exception, and section 552.107 of the Government Code, which excepts information within the attorney-client privilege, are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive section 552.103), 630 at 4 (1994) (governmental body may waive section 552.107(1)). Therefore, the portions of Exhibits 3, 9, 12, and 13 that are subject to section 552.022 may not be withheld under either section 552.103 or section 552.107 of the Government Code.

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
> >
> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (D) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A "client," for purposes of the attorney-client privilege, is defined as "a person, public officer, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer." *Id.* 503(a)(1). A "representative of a client" is defined as either:

> (A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or
>
> (B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

*Id.* 503(a)(2). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of

professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). While you argue that some of the information in question falls within the attorney-client privilege, you fail to identify the parties involved in the communications, indicate whether the communications were made between privileged parties, or explain that the communications were made in the furtherance of the rendition of legal services. Thus, we find that the city may not withhold any of the information that is subject to section 552.022 under section 552.107 of the Government Code. Rather, the city must release the information subject to section 552.022, which we have marked.

Next, we consider your section 552.103 argument with respect to the submitted information that is not subject to section 552.022. Section 552.103 provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate that the city is currently involved in a lawsuit with Seabrook Partners, Ltd. In support of this contention, you have submitted Seabrook's original petition in the case as well as the city's original answer and counterclaim. You indicate that the plaintiff claims that the city breached a previous settlement agreement in failing to construct a road. It appears the city counter-claimed, alleging that Seabrook breached the settlement agreement by failing to construct its portion of the road. Based on your

arguments and our review of the submitted information, we agree that some of the submitted information relates to pending litigation. The city may therefore withhold this information under section 552.103 of the Government Code. We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.[2] We further note that you have not adequately demonstrated how some of the information included in Exhibits 3, 9, 11, and 13 relates to the pending litigation; therefore, the city may not withhold this information under section 552.103. *See* Open Records Decision No. 638 at 4 (1996). Because you make no other argument for withholding the information in Exhibit 9, the city must release the information in that exhibit that is not otherwise protected under section 552.103. We have marked this information that must be released.

With respect to the information in Exhibits 3 and 13 that is not protected under section 552.103, you also contend that the information is excepted from disclosure under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. You indicate that "[t]here are a significant number of documents that the City believes fall within . . . the attorney client exception under § 552.107 . . . ." However, you make no effort to explain how the information in question constitutes a client confidence or a communication of legal advice or opinion. Consequently, we find that the city may not withhold the information in question under either section 552.103 or section 552.107. Rather, the city must release this information in Exhibits 3 and 13, which we have marked.

With respect to the information in Exhibit 11 that is not protected under section 552.103, you also contend that the information is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath,* 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice,

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[2]The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. You indicate that the document in question discusses "the advice, recommendations, and opinions of government policy makers." However, you do not indicate, nor does it appear, that this document constitutes an interagency or intraagency memorandum or letter.

You also indicate that the document may fall under the attorney work product privilege, as incorporated into the Public Information Act by section 552.111. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). You do not indicate, nor is it apparent, that the document in question either was created for trial or reveals an attorney's mental processes, conclusions, and legal theories. Consequently, we find that the city may not withhold the document in question under either section 552.103 or section 552.111. Rather, the city must release this document in Exhibit 11, which we have marked.

In summary, the city must release some of the information in Exhibits 3, 9, 12, and 13, which we have marked, pursuant to section 552.022 of the Government Code. The city must also release some of the information in Exhibits 3, 9, 11, and 13, which we have marked, because you did not adequately demonstrate that this information is excepted from disclosure under section 552.103, 552.107, or 552.111. The city may withhold the remainder of the submitted information under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

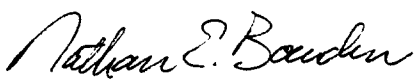
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
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Ref: ID# 150253

Enc: Submitted documents

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